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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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)

Application by BellSouth Corporation,)
BellSouth Telecommunications, Inc., and)
BellSouth Long Distance, Inc.)
for Provision of In-Region, InterLATA)
Services in Louisiana)
)
_____)

CC Docket No. 97-231

**COMMENTS OF THE
COMPETITION POLICY INSTITUTE**

Ronald Binz, President and Policy Director
Debra Berlyn, Executive Director
John Windhausen, Jr., General Counsel

Competition Policy Institute
1156 15th St. NW Suite 310
Washington, D.C. 20005

November 25, 1997

Ms. Of Counsel
11/25/97

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SUMMARY

The Competition Policy Institute (CPI) respectfully submits these initial comments on the Application by BellSouth Telecommunications, Inc., et al., (BellSouth) to provide in-region, interLATA services in Louisiana. CPI is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers.

BellSouth's Application does not meet the requirements of section 271 at this time. First, BellSouth does not satisfy the Track A requirement that it provide access and interconnection to a "competing" provider. BellSouth argues that providers of Personal Communications Services (PCS) meet the "competing" provider requirement. PCS providers, however, do not provide a "competing" service; they provide a different service (mobile service) at substantially higher rates than basic local telephone service.

Second, BellSouth's Application does not meet the public interest test. As in our comments on the Ameritech-Michigan application, these comments suggest an approach toward enforcing the public interest standard when considering 271 applications. While the public interest standard inherently permits the FCC to exercise considerable discretion, the Commission should narrow the scope of its public interest inquiry in order to provide greater guidance to the industry and to consumers. For "Track A" applications in particular, the FCC should give primary consideration, or "substantial weight", to whether consumers in that state have a realistic choice of alternative local exchange carriers. The Commission cannot expand the "checklist"; thus, it cannot decide that the lack of a realistic choice alone is sufficient to deny the application.

If consumers in a state do not have a realistic choice, however, the application should be presumed to fail unless the RBOC can prove that other public interest factors outweigh the lack of choice in that market.

BellSouth has not demonstrated that consumers in Louisiana have a realistic choice for local telephone service. While some consumers in Louisiana may supplement their local telephone service with Personal Communications Services (PCS), these services' high prices and lack of coverage area do not provide most consumers with a true alternative carrier of local telephone service. While BellSouth's application accurately notes that there could be some consumer benefits from its entry into long distance, these potential benefits are not likely to materialize unless BellSouth faces market pressures from alternative local carriers to pass these benefits on to its local service ratepayers. In other words, the potential benefits of BellSouth's long distance entry do not outweigh the presumption against the application that arises from the fact that consumers lack a realistic choice for local telephone service. For this reason, BellSouth's application does not satisfy the public interest test at this time.

These comments are divided into three sections. The first section will discuss the fact that PCS carriers generally do not today provide a "competing" service and thus do not meet the requirements of Track A. Second, the comments discuss the reasons why the Commission should begin its public interest analysis by determining whether consumers have a realistic choice for local telephone service. Third, these comments will discuss the lack of evidence in the BellSouth Application to demonstrate that it overcomes the presumption against it and satisfies the public interest test.

I. BELLSOUTH'S APPLICATION DOES NOT MEET THE REQUIREMENTS OF TRACK A BECAUSE A PCS CARRIER IS NOT A "COMPETING" PROVIDER.

BellSouth maintains that "'competing provide[r] of telephone exchange service' should be read by the Commission to encompass PCS providers for purposes of Track A." This argument defies legislative intent and common sense.

Under traditional economic theory, PCS does not "compete" with telephone exchange service because it is a different service altogether. PCS differs from basic telephone exchange service in many ways. First, PCS provides mobile service, while basic telephone service is generally fixed. More important, the prices for PCS are considerably higher than the prices for basic local telephone service. The high prices for PCS make it unaffordable for the vast majority of consumers today. Furthermore, the PCS carriers are still building their systems; many consumers cannot take advantage of PCS because they live outside the coverage areas of the system. By contrast, consumers can obtain basic local, wireline telephone service virtually anywhere in the country.

Finally, PCS simply does not fit the language or the purpose of the Track A requirement. Track A requires that the carrier be "competing". Congress chose the word "competing" rather than "other" or "any", in order to ensure that the provider offered a similar service as that provided by the RBOC. Further, the purpose of the Track A requirement is that the existence of a competing provider will exercise some amount of market discipline on the pricing and other practices of the local telephone company. There is no evidence either in the record or in the market that the availability of PCS has constrained the behavior of an RBOC.

For these reasons, PCS does not “compete” in the standard economic sense with the telephone exchange service provided by an RBOC. Thus, PCS carriers are not therefore a “competing provider[]” of telephone exchange service, and BellSouth’s Application does not satisfy the requirements of Track A

II. DETERMINING WHETHER CONSUMERS HAVE A REALISTIC CHOICE FOR LOCAL TELEPHONE SERVICE SHOULD BE THE FIRST FACTOR THE FCC SHOULD REVIEW IN ITS PUBLIC INTEREST ANALYSIS.

The public interest standard offers the opportunity for the FCC to exercise its independent judgment of the merits of the BellSouth application. While the FCC's public interest analysis is not without limits, the purpose of the public interest analysis is to ensure that applications to enter the long distance market satisfy the spirit of the legislation as well as the technical details. As CPI said in its comments on the SBC-Oklahoma and the Ameritech-Michigan applications, the public interest test allows the FCC to exercise common sense to determine whether consumers will be better off if the application is approved or denied.¹

In describing the FCC's role in enforcing the public interest test, it is easier to describe what the public interest test is not. First, the public interest test cannot be used to expand the checklist. Section 271(d)(4) provides that “[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)”. For example, the FCC cannot require a Regional Bell Operating Company (RBOC) to unbundle an

¹ CPI notes that the new Chairman of the FCC, Bill Kennard, recently endorsed the notion of common sense regulation in his nomination hearing before the Senate Commerce Committee and in his speech to the National Association of Regulatory Utility Commissioners.

additional item that is not already included among the 14-point checklist as a precondition to interLATA entry.

Second, the legislative history demonstrates that the Commission may not use a market share test to determine whether RBOC entry should be granted. The Commission cannot, for instance, require an RBOC to show that it has lost 10% of its local telephone business to competitors before it can be allowed into the interLATA market. Congress considered and rejected amendments that would have required competitors to gain a 10% share of the local market as a precondition to interLATA entry.

More generally, the FCC should not use the public interest test to establish any threshold requirement that must be met as a precondition for RBOC entry. Congress enumerated the specific preconditions that must be met prior to RBOC entry into long distance. It is not the Commission's job to expand upon the list of necessary preconditions. The FCC cannot impose additional obligations on the RBOC that must be met prior to RBOC entry in the same way that the checklist must be met. The public interest test allows the Commission to consider several factors as part of its analysis, but none of those factors alone can determine whether or not the public interest test is satisfied.

At the same time, the public interest test must mean something more than the requirements of "Track A" and the "competitive checklist" or it would not have been included in the statute. The public interest examination must allow the FCC to consider factors in addition to those already included in the set of preconditions established by Congress. If, in reviewing the application under the public interest test, the FCC does nothing more than to examine whether

the RBOC has met the checklist, has satisfied the requirements of Track A, and has indicated its intention to satisfy the separate subsidiary requirements of section 272, the Commission will have stripped the public interest test of any meaning at all.

Thus, the public interest test allows the Commission to consider all the factors that determine whether consumers would benefit from the RBOC's entry into the interLATA market. Some of the factors that the FCC should examine include: whether the RBOC's entry into long distance would lead to reduced prices for long distance service; whether the RBOC's entry would increase its ability and incentives to discriminate against long distance companies because of its ownership of local exchange facilities; whether the RBOC has engaged in any illegal or discriminatory behavior; the extent and level of local telephone competition in the State; whether the RBOC's entry would allow consumers to engage in one-stop-shopping for all their telecommunications services; and actions by cities, state legislatures, or regulatory commissions to impede entry by competitors for local telephone service.

For the Commission simply to list all the possible factors that could be considered in its public interest review, however, does not provide adequate guidance to the industry for the future. Considering every one of these factors in every single application could lead to inconsistent results over time, because each Commission (and Commissioner) may arrive at a different result after balancing the same set of factors for each application.

In part to address this concern, CPI suggests that the Commission should adopt an approach that puts some boundaries to wide-ranging scope of the public interest test. In particular, the Commission should begin its public interest examination by determining whether

consumers in the state have a realistic choice for local telephone service. If consumers do not have such a choice, then the application should be presumed to fail the public interest standard. This presumption can be overcome only if the RBOC demonstrates strong evidence that consumers will benefit from the RBOC's long distance application even though they do not have a realistic choice of alternative local carriers. This approach will add definition to the public interest standard without foreclosing the FCC from exercising its discretion to consider all factors.

The "realistic choice" approach is the best place to begin a public interest analysis for several reasons. If consumers have a choice for local telephone service, many of the other factors that affect the benefits or disadvantages of RBOC entry will naturally follow. For instance, if consumers have a realistic choice for local telephone service, the RBOC will have much less incentive and ability to discriminate against long distance companies because long distance companies will have an alternative means of reaching the local customer. If consumers have a realistic choice for local telephone service, that will indicate that the RBOC is not discriminating against the local service competitor for access and interconnection to the RBOC's network. If consumers have a realistic choice for local telephone service, entry of the RBOC into the interLATA market is more likely to produce benefits to consumers because the RBOC will have greater market incentives to pass any savings it achieves through efficiencies to consumers in the form of lower rates. Finally, if consumers have a realistic choice for local telephone service, that will provide the best evidence that the market for local telephone service is truly open to competitive entry.

The “realistic choice” approach is preferable to the approach suggested by the Department of Justice (DOJ). The DOJ suggests that the Commission should examine whether the local exchange market is “irreversibly opened to competition.” While this approach is useful and is consistent with antitrust principles, there are drawbacks to this mode of analysis. First, much of the DOJ’s analysis under this proposed standard in its prior submissions on previous RBOC applications simply replicates the analysis of Track A, Track B, and the competitive checklist. As noted above, the public interest test must mean something more than Track A, Track B, and the competitive checklist for it to have any meaning. Second, the “irreversibly opened to competition” approach could be read to focus solely on actions taken by the RBOC to open its market to competition. If so, it would ignore the influence of other factors, such as state legislation, municipal regulation, and others, that may affect whether a market is truly open.² In

² If, on the other hand, the “irreversibly opened to competition” standard is read to require an analysis of all factors that affect whether a market is “irreversibly opened to competition”, the analysis would be quite lengthy. For instance, the FCC would have to examine, among others, the following factors: whether the RBOC has satisfied the 14-point checklist; whether the RBOC has taken action outside of the checklist, such as locking customers into long-term contracts with excessive termination penalties, to prevent competitive entry; whether municipal governments have imposed taxes or other discriminatory regulations on telecommunications providers; whether landlords of multiple dwelling units have allowed competitors to obtain access to their buildings without requiring huge commissions; whether state legislation has imposed discriminatory terms (such as build-out requirements (Texas) or limitations on eligibility for universal service funding actions (Arkansas)) on competitors; whether the RBOC has attempted to impose “PIC-freezes” on the ability of consumers to switch to a different local or long distance provider; whether intraLATA toll dialing parity is being provided (in those states that are permitted to order dialing parity under the Telecommunications Act), and many others. Gathering the data to evaluate each of these factors is certain to be difficult, especially within the 90-day time frame in which the Commission must rule on each application.

Further, under the DOJ’s proposal, the Commission’s job would not end there. To

short, determining whether consumers in a state have a realistic choice for local telephone service would be much easier than evaluating the multitude of factors that affect whether a market is “irreversibly opened to competition”.

Finally, there is a difference in perspective between the two standards. The “irreversibly opened to competition” approach appears to focus on the issue from the perspective of carriers. Arguably, the perspective of carriers is already taken into account in Track A, Track B, and the competitive checklist. By contrast, the “realistic choice” approach allows the FCC to examine the public interest from the perspective of consumers. While there is no doubt that the “irreversibly opened to competition” approach is also intended to benefit consumers, the “realistic choice” approach considers the issue from the perspective of consumers directly.

Some may argue that examining whether consumers have a choice for local telephone service is the type of market share analysis that was specifically rejected by Congress. As mentioned above, Congress rejected approaches that would have set a specific threshold for competition (such as a 10% market share test or a “substantial” number of subscribers) as a precondition of entry. Congress did not, however, prevent the Commission from examining whether consumers have alternative carriers of local telephone service available to them as part

determine whether a market is “irreversibly opened” to competition, the Commission must not only examine each of these factors, the Commission must also evaluate the importance of each factor on the ability of local competitors to enter that market. For instance, the receptiveness of building owners to competitive entrants is likely to be more significant in New York than in Wyoming. Actions by cities to impede entry may be more important where state governments have delegated authority over telecommunications issues to them than in states where regulatory authority is retained by the State.

of its public interest analysis. The realistic choice approach does not require the Commission to determine the market shares of any carrier; it simply asks whether consumers can, if they wish, subscribe to a carrier other than the RBOC for local telephone service. For these reasons, the “realistic choice” approach is fully consistent with Congressional intent.³

Whether consumers have a “realistic choice” for local service should not be the only factor that affects the FCC’s public interest analysis. Rather, this approach should be the most important of several factors considered by the Commission. This approach is similar to the statute’s requirement that the Commission must give substantial weight to the opinion of the Department of Justice. The Commission may override the advice of the DOJ, but only with especially strong reasons. Similarly, the Commission could find that the RBOC satisfies the public interest test even if consumers do not have a choice for local service, but only if the other factors affecting the public interest analysis in the RBOC’s favor are especially strong as to overcome a presumption against approval.

³In fact, the legislation supports examining the local market to determine whether that market is “open”. The oft-quoted phrase in the first sentence of the Conference Report states that the purpose of the legislation is to accelerate rapidly the deployment of telecommunications services “by opening all telecommunications markets to competition.” This stated purpose does not require that all companies must be able to provide all services; the goal is to open markets that were previously closed to competition. The long distance market, the equipment market, and the international market were already open at the time of passage of the legislation. The only market closed to competition at the time of passage of the Act was the local telephone market. By stating as its goal the opening of all markets to competition, the Conference Report supports the notion that the FCC should examine the openness of the local telephone market as a part of its decision on each RBOC application to provide interLATA service. CPI submits that determining whether consumers have a realistic choice for local telephone service is not the only way, but is the best way, to determine whether the local market is truly open.

In determining whether the “realistic choice” approach is satisfied, the RBOC must provide more than anecdotal information concerning isolated consumers in isolated segments of the state. The RBOC should provide, and the Commission should examine, whether alternative carriers are available to consumers in several parts of the state or only in one location in that state. The Commission should examine whether large and small business customers have a choice for local service, or only large business customers. The Commission should examine whether both urban and rural residential consumers have a choice or whether only urban consumers have such a choice. The Commission should examine whether high and low-income persons can choose an alternative provider of local service, or only high-income residents.

The Commission would run afoul of Congressional intent if it established a threshold number or amount of consumers that must have be served by an alternative carrier as a precondition to satisfying the public interest test. The Commission can, however, examine the entire state to determine whether, and to what extent, consumers have a choice of alternative providers. Clearly, two consumers in a state (one business and one residential) having a competitive alternative would not be enough; requiring every consumer in the state to have a competitive alternative available would require too much. In fact, CPI shares the view of the Department of Justice that the RBOC can satisfy the public interest standard even if it retains market power over local telephone service in at least some portions of the state.

Furthermore, the “realistic choice” approach does not require that consumers actually subscribe to a competitive provider of local telephone service. It only requires that consumers be

able to choose an alternative provider of local service.⁴ On the other hand, consumers do not have a realistic choice unless competitors are actually taking orders and providing service in the market. In other words, it is not enough if a competitor is authorized to provide service and has built facilities or ordered access and interconnection. Competitors must be operational, and consumers must be able to subscribe to competitors at the time the RBOC application is filed.

To summarize, in determining whether an RBOC has satisfied the public interest test, the FCC should examine all relevant factors for determining whether approval of the RBOC's application would benefit consumers.⁵ The most important factor is whether consumers have a realistic choice for local telephone service from an alternative provider. If consumers in a state have such a choice, then many of the benefits of interLATA entry by an RBOC will automatically flow to consumers. The FCC must not establish an arbitrary threshold level of competition that determines whether the RBOC satisfies the public interest test. The public interest test requires that the FCC must exercise its judgment in reviewing the evidence and avoid any "bright line" tests. The FCC should, however, examine the market to determine whether different types of consumers have a "realistic choice", from an operational provider, for local telephone service. If consumers in the state do not have such a choice, the application

⁴ Some have accurately described the "realistic choice" approach in shorthand as a "yellow pages" test. In other words, if an alternative carrier or carriers is (are) advertising in the "yellow pages" of the telephone directory and is accepting customers, then the "realistic choice" approach would be met, regardless of how many consumers actually subscribe to one of the competitors.

⁵ For the Commission's convenience, a summary of the "realistic choice" approach that has been provided to the Commission in the past as part of an ex parte submission on the Ameritech Michigan docket is attached to these comments.

should be presumed to fail the public interest test. This presumption can be overcome only by an especially strong showing of consumer benefits.

II. BELLSOUTH'S APPLICATION DOES NOT SATISFY THE PUBLIC INTEREST STANDARD AT THIS TIME.

A. BellSouth's Application does not demonstrate that consumers in Louisiana have a realistic choice of local telephone carriers other than BellSouth.

BellSouth's Application does not demonstrate that consumers in Louisiana have a realistic choice of local telephone carriers other than BellSouth. First, while some consumers in Louisiana may supplement their local telephone service with Personal Communications Services (PCS), these services' high prices and lack of coverage area do not provide most consumers with a true alternative carrier of local telephone service today. Second, BellSouth's Application does not appear to provide any statistical information concerning the number and type of consumers that may subscribe to a carrier other than BellSouth for local telephone service in BellSouth's service area. Instead, BellSouth provides limited information concerning the operations of several carriers operating in Louisiana. This information about carriers is not the most relevant information for the purposes of determining whether consumers have a realistic choice; the analysis that follows draws upon this information only because this is the only information provided by BellSouth.

The carrier information provided by BellSouth is conflicting and does not support a finding that residential consumers can choose a carrier other than BellSouth today. For instance, Glenn A. Woroch states that, while several wireline, facilities-based competitors are providing

local services to businesses, “[a]t this time, however, none of these CLECs [competitive local exchange carriers] have sold exchange services to residential customers.” (Woroch Affidavit, para. 7). This statement indicates that residential consumers cannot currently choose a wireline competitor that uses its own facilities.

There is little evidence that residential consumers can choose a resale carrier either.⁶ The affidavit of Gary M. Wright notes that, “[a]s of October 1, 1997, over a dozen Louisiana CLECs were providing over 7000 resold lines almost equally split between business and residential customers.” (Wright Affidavit, p. 30) BellSouth does not provide the number of lines currently served by BellSouth in Louisiana, but it would appear that 7000 resold lines reflects substantially less than 1% of the total number of BellSouth access lines in that state (and possibly less than ½ of 1%). While this market share information does not necessarily determine whether customers could choose an alternative carrier, it does signify that the amount of competition in Louisiana via resale is almost infinitesimal.⁷

B. BellSouth’s Application does not provide sufficient consumer benefits to overcome the presumption against its application that arises from the lack of “realistic choice.”

BellSouth’s Application does not demonstrate sufficient consumer benefits to overcome

⁶ As is indicated in CPI’s ex parte submission attached to these comments, CPI believes that the availability of competing local providers offering resold service could meet the “realistic choice” approach. Under the evidence submitted by BellSouth, however, it does not appear that sufficient numbers of consumers have a choice of either resale or facilities-based carriers available to them.

⁷ Again, CPI is limited to commenting on this “market share” information because this is the only information provided by BellSouth from which an inference can be drawn concerning the ability of consumers to choose an alternate carrier.

the presumption against its application that arises from the consumers' lack of a realistic choice. While BellSouth argues that its entry into long distance is inherently in the public interest, this view was rejected by Congress when it determined that the RBOCs should only be allowed into long distance after certain preconditions, including a public interest showing, were met. If Congress believed that the entry of the RBOCs into long distance would automatically serve the public interest, it would not have delegated to the FCC the decision to make this determination. Thus, BellSouth must demonstrate that its entry into long distance under the specific facts set forth in this application is in the public interest, and these reasons must be sufficiently strong to override the aforementioned presumption.

BellSouth attempts to buttress its public interest argument by committing to underprice AT&T's prices by at least 5%. In particular, BellSouth "has committed, upon receiving interLATA authority, to setting its initial basic rates at least 5% lower than the corresponding rate of the largest interexchange carrier." (Application, p. 130) While reducing prices is a worthy goal, the consumer benefit from this particular commitment is not great. For one, almost every one of the 500 or so long distance carriers makes it a practice to underprice the rates of the largest carrier by at least this amount. This is the principal way that competing long distance carriers have been able to win business away from AT&T. Rather than a charitable act on the part of BellSouth, this commitment to underprice AT&T by 5% is simply states the obvious business strategy that BellSouth would adopt as a new entrant in the long distance market. Second, it is not clear how long or how far this commitment will go. BellSouth only commits to underpricing AT&T for its "initial basic rates". What rates BellSouth will charge after it gains

significant long distance market share, and how much it will charge for "non-basic" rates, is not clear.

The affidavit of Mr. Richard A. Gilbert focuses on the desire of consumers to have one-stop shopping available as a reason that BellSouth's application is in the public interest. The availability of one-stop-shopping will undoubtedly be convenient for many consumers. As Mr. Gilbert notes, however, most long distance companies and potential competitors are already able to provide one-stop-shopping. The restriction on the three largest long distance companies' ability to provide joint marketing will come to an end in just over one year. From a consumer perspective, the relevant question is thus how much additional consumer benefit there will be from allowing BellSouth to provide one-stop-shopping services to consumers. While there may well be some consumer benefit from allowing BellSouth to provide one-stop-shopping, this benefit has to be weighed against the possibility that allowing BellSouth into the interLATA market too early could give BellSouth incentives to restrict the ability of competitors to purchase the essential elements of local service that will allow them to provide one-stop-shopping. Competitors are already having difficulty entering the local market and providing the package of services that consumers want. This difficulty could become worse if BellSouth is allowed to enter the interLATA market before consumers have a realistic choice of alternate local carriers. Thus, the purported consumer advantage of allowing BellSouth to provide one-stop-shopping is not as strong as BellSouth's Application maintains.

Mr. Gilbert's affidavit also argues that BellSouth will be able to realize substantial economies of scale and scope in providing and marketing both local and long distance service.

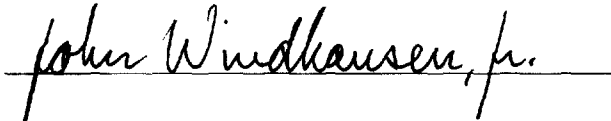
To the extent that these economies exist, however, BellSouth is only likely to pass these benefits on to its ratepayers if its consumers are able to choose carriers other than BellSouth for their local telephone service. Otherwise, BellSouth's efficiency gains may be maintained by BellSouth's shareholders, rather than consumers. Thus, the argument that BellSouth will have natural efficiencies, even if true, is insufficient to override the presumption against it.

IV. CONCLUSION

BellSouth's Application to provide interLATA service in Louisiana fails for several reasons. First, it fails to meet the requirements of Track A because PCS carriers do not qualify as "competing providers" and do not exercise market restraint on the activities of the RBOC. Second, BellSouth's Application does not demonstrate that consumers in Louisiana have a realistic choice of alternative local telephone carriers. The Commission should find that the lack of such a choice creates a presumption that the Application does not meet the public interest test. Finally, BellSouth's other arguments under the public interest test are not persuasive. The purported efficiencies of providing joint local and long distance service will only accrue to consumers if they first have a choice among different local service providers.

For all these reasons, the BellSouth Application to provide interLATA service in Louisiana should be denied.

Respectfully Submitted,

A handwritten signature in cursive script, reading "John Windhausen, Jr.", is written over a horizontal line.

Ronald Binz, President and Policy Director
Debra Berlyn, Executive Director
John Windhausen, Jr., General Counsel

Competition Policy Institute
1156 15th St. NW Suite 310
Washington, D.C. 20005

November 25, 1997

Certificate of Service

I, Bridget J. Szymanski, hereby certify that on this twenty-fifth day of November, 1997, copies of the foregoing Comments of the Competition Policy Institute were served by hand or by first-class, United States mail, postage prepaid, upon each of the following:

Janice Myles
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M St., NW
Washington, DC 20554

Secretary
Federal Communications Commission
Room 222
1919 M St., NW
Washington, DC 20554

ITS, Inc.
1231 20th St., NW
Washington, DC 20036

Walter Alford
William Barfield
Jim Ilewellyn
1155 Peachtree St., NE
Atlanta, GA 30367

David Frolio
1133 21st St., NW
Washington, DC 20036

Gary Epstein
Latham & Watkins
1001 Pennsylvania Ave., NW
Washington, DC 20004


James Harralson
28 Perimeter Center East
Atlanta, GA 30346

Louisiana Public Service Commission
PO Box 91154
Baton Rouge, LA 70821-9154

Michael Kellogg
Austin Schlick
Kevin Cameron
Jonathan Molot
William Petersen
1301 K St., NW
Suite 1000 West
Washington, DC 20005

Margaret Greene
R. Douglas Lackey
Michael Tanner
Stephen Klimacek
675 W. Peachtree St., NE
Suite 4300
Atlanta, GA 30375

Donald Russell
Telecommunications Task Force, Antitrust Division
US Department of Justice
555 Fourth St., NW
Room 8205
Washington, DC 20001


Bridget Szymanski
Office Manager

CPI Competition Policy Institute

Aug. 4, 1997

Ms. Regina Keeney
Chief
Common Carrier Bureau
Federal Communications Commission
1919 M St. N.W.
Washington, D.C. 20554

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AUG - 4 1997

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541

**EXPORTE: Application of Ameritech Michigan to provide
InterLATA service in Michigan under Section 271.
CC Docket No. 97-137**

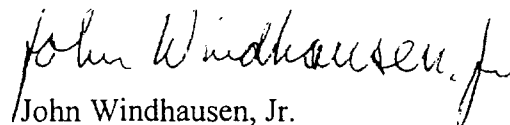
Dear Ms. Keeney:

Last week, Ron Binz, Debra Berlyn and John Windhausen of the Competition Policy Institute (CPI) met with several staff from the Common Carrier Bureau to discuss CPI's comments in the above-captioned proceeding. We discussed CPI's suggestion that the FCC should consider whether consumers have a realistic choice for local telephone service as a principal part of its application of the public interest standard

In response to several questions raised in these meetings and further thinking on our part, we have prepared a revised summary of our views, which is attached to this letter. In particular, you may note our position that the availability of a resale competitor could satisfy the realistic choice approach. We also take the position that the realistic choice approach would not be appropriate for a Track B application; instead, we suggest that an RBOC making a Track B application should be required, as part of the public interest test, to comply with enhanced safeguards. (We will provide additional thinking about these safeguards when a Track B application is filed.)

Pursuant to section 1.1206(a)(2) of the Commission's rules, an original and one copy of this notice are being filed with the Office of the Secretary.

Sincerely,


John Windhausen, Jr.
General Counsel

cc: Richard Metzger; Kathy Levitz; Richard Welch; Daniel Shiman; Christopher Heimann; Carol Matthey; Michael Pryor; Florence Setzer.

REVISED: August 1, 1997

**CPI's "REALISTIC CHOICE" APPROACH TO
THE PUBLIC INTEREST STANDARD
CONCERNING RBOC 271 APPLICATIONS**

1. The "public interest" test must mean more than the implementation of the "competitive checklist" and the requirements of Track A and Track B, or it will have no meaning at all.
2. While the Track A/Track B provisions and the "checklist" examine competition from the perspective of the carriers, the public interest test offers the Commission the opportunity to examine the question from the perspective of consumers.
3. While the FCC should examine ALL factors that affect whether approving a 271 application would benefit consumers, the FCC need not give them all equal weight. The Commission should give primary importance, or "substantial weight", to whether consumers in the state have a *realistic choice* of alternate local telephone providers.
4. The "realistic choice" approach allows the FCC to conduct a "reality check" of the local telephone marketplace to ensure that its decision on RBOC entry is not based entirely on legalities. The "realistic choice" approach allows the FCC to examine whether the market is truly functioning in a manner that allows consumers to choose an alternate local service provider.
5. The availability of a "realistic choice" for consumers of local telephone service is critically important to any long distance application for several reasons:
 - a) The availability of local competition is the only sure way to determine that all the barriers to local competition have been removed. The best proof that the market is open is if competitors are actually entering the market and consumers have a choice of alternate carriers.
 - b) Some degree of choice is a necessary safeguard to protect against discrimination against competitive long distance companies, cross-subsidization, and other anticompetitive harms. If long distance companies and consumers have an opportunity to choose an alternate local provider, the RBOC will have greatly reduced incentives to engage in anticompetitive conduct.
 - c) As the DOJ comments state, the benefits of local competition are far greater to consumers than the benefits of adding one more long distance competitor to a relatively competitive long distance market.

- d) The “realistic choice” approach is simpler to administer than the DOJ’s proposed “irreversibly opened to competition” standard. To determine whether a market is irreversibly opened to competition, the Commission would have to examine many additional factors that affect the growth of competition beyond the RBOC’s compliance with the checklist and determine their relative importance. Since the realistic choice approach is an “end results” test, it is much easier to evaluate.
6. If, rather than adopt CPI’s “realistic choice” standard, the FCC adopts the DOJ’s “irreversibly opened to competition” standard, the FCC must examine ALL factors that affect whether a market is open to competition. For instance, the FCC must take into account actions by the RBOCs to delay competition that are not included in the checklist (such as PIC-freezes, withholding billing information, intraLATA toll dialing parity, locking customers into long-term contracts, etc.) AND must take into account practices of other entities (such as excessive municipal regulation of new entrants and actions by landlords of MDUs) to determine whether a market is truly open. Several cities in Michigan, for instance, have taken action that discourages competition.
7. The *realistic choice* approach is NOT:
- a) a market share test. The realistic choice standard measures whether consumers can choose a competitor, not whether they actually have subscribed to a competitor. (The FCC can, however, examine market shares as evidence of whether competitors are available.)
 - b) adding to the competitive checklist. The FCC should not use the *realistic choice* standard as a precondition to interLATA entry in the same way that checklist items are preconditions. Whether consumers have a realistic choice is one factor, albeit the most important factor, of several that the FCC should consider as part of its public interest analysis.
8. As part of a *realistic choice* approach, the FCC should examine:
- a) whether urban, suburban and rural customers have a realistic choice;
 - b) whether large businesses and small businesses have a realistic choice;
 - c) whether residential customers in apartment buildings and residential customers in single-family homes have a realistic choice;
 - d) whether competitors are available in one location in the state or throughout the state.
 - e) whether high-income subscribers, middle-income subscribers and low-income subscribers have a realistic choice.

It is not necessary for the Commission to find that every one of these categories of

consumers have a competitor available to them. But the Commission should gather evidence of the availability of competition for each of these subgroups. The more categories of consumers that have a realistic choice available to them, the more likely the RBOC application would satisfy the public interest test.

9. Given that there are already well over 50 competitors for local telephone service, it is simply inconceivable that they would all collude to delay their entry into the local market simply to delay the RBOCs from receiving interLATA approval.
10. CPI believes that resale competition would satisfy CPI's "realistic choice" standard. In other words, as long as a significant number of consumers in different categories have a "realistic choice" of an alternate provider, the RBOC is likely to satisfy the public interest test whether the competitive service being offered to consumers is via the competitors' own facilities, unbundled elements, or resale.
11. Track B was intended to allow an RBOC to enter even if no facilities-based competitor comes to the market. The "realistic choice" approach is not appropriate in these circumstances. Yet, the public interest standard applies to Track B applications as well. CPI believes that, instead of the realistic choice approach, the public interest standard for Track B applications should include a showing that the RBOC will comply with enhanced safeguards to protect against discriminatory conduct.